



Neutral Citation Number: [2020] EWHC 961 (Fam)

Case No: ME18P005 and FDP00668

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
LIVERPOOL DISTRICT REGISTRY

Civil and Family Court
35 Vernon Street
Liverpool
L2 2BX

Date: 27/04/2020

Before:

THE HONOURABLE MR JUSTICE MACDONALD

Between:

H
- and -

Applicant

B
- and -

First
Respondent

V
(By his Children's Guardian)

Second
Respondent

Ms Rachel Langdale QC and Mr Simon Rowbotham (instructed by Goodman Ray) for the Applicant

The First Respondent did not appear and was not represented

Ms Maria Hancock (instructed by Coole Bevis LLP) for the Second Respondent

Hearing dates: 12 March 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic. Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be at 10.30am on 27 April 2020.

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MR JUSTICE MACDONALD

This judgment was delivered in private. The Judge has given permission for this anonymised version of the judgment (and any of the facts and matters contained in it) to be published on condition always that the names and the addresses of the parties and the children must not be published. For the avoidance of doubt, the strict prohibition on publishing the names and addresses of the parties and the children will continue to apply where that information has been obtained by using the contents of this judgment to discover information already in the public domain. All persons, including representatives of the media, must ensure that these conditions are strictly complied with. Failure to do so will be a contempt of court.

Mr Justice MacDonald:

INTRODUCTION

1. This case concerns V, born in 2016 and now aged 3 years old. The father of V is the Applicant, H (hereafter ‘the father’), a British national represented by Ms Rachel Langdale, Queen’s Counsel and Mr Simon Rowbotham of counsel. The mother of V is the First Respondent, B (hereafter ‘the mother’), a Polish national. The mother has not appeared nor been represented at this hearing although she has been given notice of it. V is a party to these proceedings and is represented by Ms Maria Hancock of counsel, through his Children’s Guardian, Kim Richardson.
2. V is currently in the jurisdiction of Poland with the mother, having been retained in that jurisdiction by the mother in September 2019. Since his retention, the courts in this jurisdiction have made three summary return orders. Two were made in proceedings under the Children Act 1989 on 27 September 2019 and 8 October 2019 by His Honour Judge Robinson and one was made in the High Court on 2 December 2019 by Her Honour Judge Robertshaw sitting as a Deputy High Court Judge, although the precise jurisdictional basis for the latter order remains somewhat unclear for reasons that I will come to.
3. The father now seeks to enforce those summary return orders by way of the provisions of Chapter III of Council Regulation (EC) 2201/2003 (hereafter BIIa). The question that is posed before this court, in circumstances that I shall come to, is whether the father is permitted to pursue that route notwithstanding that the father is also now pursuing proceedings in Poland under the 1980 Hague Convention, which proceedings are ongoing. For the reasons I set out below, I am satisfied that that question is not one that falls properly to be answered by this court.

BACKGROUND

4. The parties met in September 2014 and commenced cohabitation in July 2015. V was born in Poland in June 2016. Later that year the parents and V returned to England, where they continued to reside as a family. The parties separated in April 2017 and the father applied for a child arrangements order and a prohibited steps order preventing the mother from removing V from the jurisdiction of England and Wales. On 28 April 2017 the court granted a without notice prohibited steps order to that end. On 27 September 2017 District Judge Sullivan made a final child arrangements order providing for V to live with both parents. Having expressed the view that the father’s concerns regarding the Mother going to Poland were understandable, District Judge Sullivan maintained the prohibited steps order to run until January 2018.
5. On 9 January 2018 the mother applied for a without notice prohibited steps order to prevent the father from removing V from her care and a specific issue order regarding the provision of a passport for V. The mother also applied for a non-molestation injunction. On the same day District Judge Brown granted a non-molestation order and suspended the operation of the child arrangements order. On 10 January 2018 the father applied to enforce the child arrangements order pursuant to s. 11J of the Children Act 1989. On 31 January 2018 District Judge Sullivan varied the child arrangements order and provided for the father to have contact with V on alternate Saturdays. The various applications were consolidated and the matter was listed for a

finding of fact hearing. District Judge Sullivan also declared V to be habitually resident in the jurisdiction of England and Wales and extended the operation of the prohibited steps order preventing his removal therefrom. On 21 June 2018 the father issued a further application for a child arrangements order. That application was accompanied by a Form C1A in which the father again raised his concern that the mother posed a risk of the abduction of V to Poland.

6. The finding of fact hearing was conducted by HHJ Robinson over four days between 3 and 9 January 2019. During the course of that hearing, the learned judge noted that the father was not wholly without justification with respect to his concern that the mother would remove V to Poland and cease contact with the father. Within this context, HHJ Robinson concluded as follows:

“[39] ... In relation to passports and travel abroad, as I have indicated on a number of occasions, the basic starting point is that unless there is a good reason otherwise, mother should be allowed to take the child to Poland for holidays with her family.

[40] At the moment, my view is that two weeks would be sufficient, given his age. I am perfectly prepared to agree that the order should make very clear that the child is habitually resident in England, is the subject of English court orders and must be returned promptly. I am also prepared to say that any trips out of the jurisdiction must be notified in advance and that the child must be returned on the date said.

[41] These are details, that may give reassurance, but I do not think that that is reason for not allowing her to go to Poland providing they are complied with...”

Within this context, the order of 9 January 2019 provided that the mother was not permitted to take V out of the jurisdiction of England and Wales except for a period of 15 days on condition that she provide 28 days’ notice and return the child to the jurisdiction of England and Wales at the conclusion of the visit.

7. Following the finding of fact hearing, the case was adjourned to a final hearing in May 2019 with a direction for a report under s. 7 of the Children Act 1989. The prohibited steps order remained in place but, as I have noted, made provision for the mother to travel to Poland with V for 15 days. An effective final hearing did not in the event take place, but on 30 July 2019 a further child arrangements order was made varying the time the father spend with V. The mother was granted permission to take V to Poland on holiday from 2 September to 14 September 2019. The order again declared that V was habitually resident in the jurisdiction of England and Wales and asserted the court’s jurisdiction over welfare decisions concerning him. Finally, a specific issue order was granted permitting the mother to obtain a Polish passport for V.
8. On 2 September 2019 the mother is understood to have travelled to Poland with V. On 13 September 2019 the mother’s solicitors sent an email stating that V was “unwell with asthma”. On 16 September 2019, two days after the mother was required to return V to the jurisdiction of England and Wales, she informed the

Children's Guardian by telephone that V was too ill to travel and the mother did not know when he would be well enough to do so.

9. On 19 September 2019 the father applied to the English court for an order requiring the immediate return of V to the jurisdiction of England and Wales and for a child arrangements order that V live with him. On 27 September 2019 HHJ Robinson ordered the mother to return V to the jurisdiction of England and Wales unless medical evidence was provided to explain why he was not fit to travel. At a hearing on 8 October 2019 HHJ Robinson found that, while it appeared V may have received medical treatment in Poland, the Mother had "failed to provide sufficient information to the Court" such that V's inability to travel remained "in doubt". Within this context, HHJ Robinson made a further order that the mother return V to England. That order required the mother to ensure V's return by 13 October 2019 or else to "provide a clear medical report stating that the child is not fit to travel to England". The matter was listed for a return date on 4 November 2019.

10. On 29 October 2019 the mother for the first time provided what purported to be a medical certificate signed by a Dr T. The document referred to a "undefined bronchial asthma". In translation, the certificate states as follows:

"Purpose of issuing the certificate: patient requires constant care of an allergy specialist and constant, long-term application of inhalants under the care of an allergist. Currently, during convalescence after a hospital stay, embarking on a long journey could lead to aggravation of symptoms of bronchial asthma."

The Children's Guardian made subsequent attempts to speak to Dr T but was told that no such doctor worked at the address given on the medical certificate. The mother has failed to provide further contact details for the doctor. The hearing on 4 November 2019 was vacated.

11. On 15 November 2019 the father made two further applications in an attempt to secure the return of V to this jurisdiction. First, he applied in the High Court for a summary return order. That application purported to be made under the Child Abduction and Custody Act 1985 using Form C67 and was prepared by the father's solicitors. In addition, the father also instigated, through ICACU, an application in Poland for a summary return order pursuant to the provisions of the 1980 Hague Convention.

12. On 2 December 2019, HHJ Robertshaw sitting as a Deputy High Court Judge found that the mother had not produced any evidence establishing that V was unfit to travel and that the mother had wrongfully retained V in the jurisdiction of Poland. Within this context, HHJ Robertshaw ordered the mother to return V to the jurisdiction of England and Wales within 21 days of the date of the order and to surrender all passports to the court. It is not clear under what jurisdictional provision the learned Judge purported to make the summary return order, reference being made at the head of her order to the Child Abduction and Custody Act 1985, BIIa and the Senior Courts Act 1981. As I have noted, the father's application for the summary return order purported to have been made under the Child Abduction and Custody Act 1985. However when the matter came before Ms Deirdre Fottrell QC sitting as a Deputy

High Court Judge on 24 January 2020, she treated the order of 2 December 2020 as having been made under the inherent jurisdiction of the High Court.

13. On 13 January 2020 the father applied for enforcement of the summary return order purportedly made on 2 December 2020 and requested a certificate pursuant to Art 42 of BIIa (the father now concedes that this request was erroneous and that a request should have been made for a certificate under Art 39 of BIIa). The father also applied for an order transferring the proceedings under the Children Act 1989 to the High Court, which order was granted by Moor J.
14. As I have noted, on 24 January 2020 the matter came before Ms Deirdre Fottrell QC sitting as a Deputy High Court Judge. Before Ms Fottrell QC the father's application was then expressed by junior counsel to be an application for a penal notice pursuant to s. 11J of the Children Act 1989 and enforcement of the return orders made by HHJ Robinson in the Children Act 1989 and a request for a certificate under BIIa. Junior counsel for the father contended that, in the circumstances of this case, this required orders to be made "within the framework of" Art 11 of BIIa and for a certificate to be issued pursuant to Art 42 of BIIa. As I have already alluded to, it is now accepted by Ms Langdale that these submissions were erroneous and indeed junior counsel corrected the error when the matter came before Moor J on 19 February 2020. With respect to enforcement of the domestic summary return orders, given V's removal to Poland the appropriate framework for reciprocal enforcement is that provided by Chapter III of BIIa. Further, Art 11 of BIIa would only apply had the Polish court made an order for non-return for the purposes of Art 11(8) of BIIa in the pending proceedings under the 1980 Hague Convention. In any event, Ms Fottrell QC raised the issue of whether, the father having issued proceedings under the 1980 Hague Convention in Poland, it was open to him to seek to enforce the domestic return orders under Chapter III of BIIa in tandem with those Convention proceedings. On 19 February 2020 the matter was listed before me for hearing with a time estimate of 1 day to consider that question.
15. With respect to the father's application in Poland under the 1980 Hague Convention, on 13 December 2019, ICACU confirmed that an application under the Convention had been sent to the Polish Central Authority, which confirmed receipt on 19 December 2019. On 9 January 2020 the Polish court notified the father that it had joined a domestic application made by the mother to his application under the 1980 Hague Convention. On 29 January 2020 the father received confirmation that he had been allocated a lawyer in Poland but could not obtain a reply to his correspondence with that lawyer. On 31 January 2020 the Polish Central Authority confirmed that no hearing date had been set and that the father should submit information under Art 55 of BIIa. On 3 February 2020 the father was informed that his Polish lawyer had resigned due to speaking insufficient English. On 5 February 2020 the Polish Central Authority again requested that the father submit information under Art 55 of BIIa. On 24 February the father was notified by ICACU of a hearing in Poland on 19 March 2020 and the details of his new Polish lawyer.

THE LAW

16. In *Re S (Abduction: Hague Convention or BIIA)* [2018] 2 FLR 1405 Moylan LJ made clear as follows regarding the jurisdiction of the domestic court to make a summary return order in an appropriate case:

“[44] However, I do accept Mr Harrison's submission that the court in England and Wales has power to make a summary return order when it has substantive jurisdiction under BIIa. I do not see how it can be argued that an order requiring a child to be returned from another Member State to England does not fall within these provisions. It forms an aspect of the exercise of parental responsibility. Indeed, such orders are commonly made as part of, say, an order permitting a child to spend time with a parent in another Member State. If such an order is within the scope of BIIa, it could not be excluded simply because it was made at a summary hearing. The summary nature of the hearing does not change the nature of the order which would still be dealing with the exercise of parental responsibility and would remain governed by section 1 of the Children Act 1989, making the child's welfare the court's paramount consideration.”

17. Within this context, in proceedings under the Children Act 1989, the court may grant a specific issue order pursuant to s. 8 of the Children Act 1989 requiring the child who is habitually resident in England and Wales for the purposes of Art 8 of BIIa to be returned to the jurisdiction of England and Wales (the court ordinarily retaining jurisdiction based on habitual residence subsequent to any wrongful removal pursuant to the provisions of Art 10 of BIIa). In *Re D (A Minor)(Child: Removal from the Jurisdiction)* [1992] 1 WLR 315 at 318 the Court of Appeal confirmed that there is nothing in the Children Act 1989 which precludes the court from making a specific issue order for the return of a child from outside the jurisdiction of England and Wales and a prohibited steps order for the non-removal of the child thereafter. Within this context, in this case HHJ Robinson made return orders in the proceedings under the Children Act 1989 on 27 September 2018 and 8 October 2019.
18. As I have noted, on 2 December 2019 HHJ Robertshaw also purported to make a return order in the High Court. As I have also noted above, the jurisdictional basis on which that order was made is unclear. Once again, the order references the Child Abduction and Custody Act 1985, BIIa and the Senior Courts Act 1981, the father's application was made under the 1985 Act and Ms Fottrell QC proceeded on 24 January 2020 on the basis that the order was made under the inherent jurisdiction of the High Court.
19. It is well established that the High Court can make a summary return order pursuant to its inherent jurisdiction. However, whilst conferring power pursuant to s. 8 to declare a removal from the jurisdiction of England and Wales to have been wrongful, the Child Abduction and Custody Act 1985 Act contains no free standing statutory power to grant a return order with respect to a child who is habitually resident in, and has been removed from, the jurisdiction of England and Wales. Rather, the 1985 Act confers jurisdiction on the courts in England and Wales to entertain applications for return orders under the 1980 Hague Convention where a child has been brought to the jurisdiction of England and Wales from his or her country of habitual residence (see Child Abduction and Custody Act 1985 s.4). In such circumstances, the Central Authority in the Contracting State which is the country of the child's habitual residence applies to ICACU for assistance in securing the return of the child and ICACU then applies to the High Court under the Child Abduction and Custody Act 1985 for assistance in securing the child's return pursuant to the provisions of the 1980 Convention. Where a child is habitually resident in, and has been removed from

the jurisdiction of England and Wales to Contracting State to the 1980 Convention, the application for a return order under the 1980 Convention falls to be made in the receiving Convention country, via that country's Central Authority.

20. Within this context, the father invites me to proceed on the basis that the order of 2 December 2020 was correctly made under the inherent jurisdiction and now to attach a penal notice to that order. The Children's Guardian points out that the order was granted at a hearing at which the mother was not present, that there is some doubt about whether she had notice of the hearing or understood the purpose of it if she was on notice. Within this context, in the alternative the father invites the court to grant a further return order at this hearing under the inherent jurisdiction of the High Court. Thereafter, the father seeks to enforce the return orders made in this jurisdiction pursuant to the provisions in Chapter III of BIIa. Chapter III of BIIa provides the legal framework for the enforcement of orders made in one EU Member State, in this case England, in another EU Member State, in this case Poland.
21. Return orders fall within the scope of the enforcement provisions of Chapter III of BIIa as was confirmed in *Hampshire County Council v CE and NE* C-325/18 PPU and C375/18 PPU, in which the CJEU held that:

“[55] It is clear from Article 1(1)(b) of Regulation No 2201/2003 that that regulation is to apply, whatever the nature of the court or tribunal, in civil matters relating, inter alia, to the attribution, exercise, delegation and restriction or termination of parental responsibility. In this connection, the expression ‘civil matters’ must not be understood restrictively but as an autonomous concept of EU law, covering in particular all applications, measures or decisions in matters of ‘parental responsibility’ within the meaning of that regulation, in accordance with the objective stated in recital 5 in its preamble (judgment of 21 October 2015, *Gogova*, C-215/15, EU:C:2015:710, paragraph 26).

[56] Article 1(2)(a) to (d) of Regulation No 2201/2003 states that matters relating to parental responsibility may, in particular, deal with rights of custody, guardianship, the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child and the placement of the child in a foster family or in institutional care.

[57] The concept of ‘parental responsibility’ is given a broad definition in Article 2(7) of Regulation No 2201/2003, in that it includes all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect (judgments of 27 November 2007, *C*, C-435/06, EU:C:2007:714, paragraph 49, and of 26 April 2012, *Health Service Executive*, C-92/12 PPU, EU:C:2012:255, paragraph 59).

[58] It must be noted that the exercise by a court of its wardship jurisdiction involves the exercise of rights in relation to the welfare and education of the children that would ordinarily be exercised by the parents, for the purposes of Article 1(2)(a) of Regulation No 2201/2003, or aspects of guardianship and curatorship, within the meaning of Article 1(2)(b) of that regulation. As

the referring court pointed out, the transfer of the right of custody to an administrative authority also falls within the scope of that regulation.

[59] It is apparent in that regard from the request for a preliminary ruling that the *ex parte* order, made by the High Court (Ireland) in accordance with Chapter III of Regulation No 2201/2003, recognised the wardship order and declared it enforceable in Ireland.

[60] It is common ground that the application for the return of the three children was not based on the 1980 Hague Convention and that the operative part of the wardship order has a number of elements, including an order that those children be made wards of court and the return order. It thus appears that the latter is entailed by the decision relating to parental responsibility and is indissociable from it.

[61] It follows from this that a decision making children wards of court and directing that those children be returned, such as that at issue in the main proceedings, authorisation for the enforcement of which was sought from the High Court (Ireland), relates to the attribution and/or exercise and/or restriction of parental responsibility, within the meaning of Article 1(1) of Regulation No 2201/2003, and that it deals with ‘rights of custody’ and/or ‘guardianship’, within the meaning of paragraph 2 of that article. Consequently, such a decision falls within the scope *ratione materiae* of that regulation.

[62] Having regard to the above, the answer to the first question is that the general provisions of Chapter III of Regulation No 2201/2003 must be interpreted as meaning that, where it is alleged that children have been wrongfully removed, the decision of a court of the Member State in which those children were habitually resident, directing that those children be returned and which is entailed by a decision dealing with parental responsibility, may be declared enforceable in the host Member State in accordance with those general provisions.”

22. Pursuant to Art 37 of BIIa, the party seeking a declaration of enforceability in another Member State pursuant to Art 28(1) with respect to a return order made in this jurisdiction must, under the provisions of Art 37(1) of BIIa, produce a copy of the return order and a copy of the Annex II certificate stipulated by Art 39 of the Regulation. The terms of Art 39 of BIIa make clear that, having made a return order, the court in this jurisdiction, as the competent court of a Member State of origin, *shall* provide the Annex II certificate at the request of an interested party, in this case the father. In the circumstances, the court has no discretion as to whether to take that step.
23. Where a party seeks to enforce a return order made in this jurisdiction in another Member State pursuant to the provisions of Chapter III of BIIa, that order will be enforced in that other Member State when the order is recognised and, pursuant to Art 28(1), on the application of that party the order is declared enforceable there. Art 21 of BIIa establishes the principle of automatic recognition in all EU Member States of orders falling under BIIa without the need for a special procedure. The general principle of automatic recognition established by Art 21 of BIIa is however, subject to

the exceptions with respect to orders concerning parental responsibility set out in Art 23 of the Regulation. In deciding whether to recognise the order and to declare it enforceable, the court of the other Member State, in this case Poland, will consider the matters set out in Art 23, which provides as follows:

“Article 23

Grounds of non-recognition for judgments relating to parental responsibility

A judgment relating to parental responsibility shall not be recognised:

(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;

(b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;

(c) where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally;

(d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;

(e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought;

(f) if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought; or

(g) if the procedure laid down in Article 56 has not been complied with.”

24. In *Povse v Alpago* Case C-211/10 [2010] 2 FLR 1343, the CJEU stated as follows at [40]:

“It must be emphasised that the system established by the Regulation is based on the central role allocated to the court which has jurisdiction pursuant to the provisions of that Regulation and that, in accordance with Recital 21 of the Regulation, the recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust, and grounds for non-recognition should be kept to the minimum required.”

25. With regard to the question posed by the Deputy High Court Judge at the hearing on 24 January 2020 concerning the impact of concurrent proceedings under the 1980 Hague Convention in the receiving Member State on the question of enforcement under Chapter III of BIIa in that Member State of a return order made in the Member State of the child's habitual residence, the following provisions of those two instruments are relevant. First, with respect to the 1980 Hague Convention, Art 29 of that Convention provides as follows:

“Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.”

In addition, Art 34 of the Convention further provides as follows:

“Article 34

This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.”

26. With respect to BIIa the following provisions of the Regulation are relevant to the issues that fall for determination before this court. Recital 21 of BIIa states as follows:

“(21) The recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required.”

Recital 23 provides as follows:

“(23) The Tampere European Council considered in its conclusions (point 34) that judgments in the field of family litigation should be "automatically recognised throughout the Union without any intermediate proceedings or grounds for refusal of enforcement". This is why judgments on rights of access and judgments on return that have been certified in the Member State of origin in accordance with the provisions of this Regulation should be recognised and enforceable in all other Member States without any further procedure being required. Arrangements for the enforcement of such judgments continue to be governed by national law.”

27. Art 60 of BIIa provides that in relations between EU Member States, BIIa shall take precedence over the 1980 Hague Convention in so far as it concerns matters governed by the Regulation. For example, in *Povse v Alpagó* the CJEU made clear that Art

11(8) of BIIa (which refers to subsequent rather than prior judgments requiring the return of the child issued by the court having jurisdiction under BIIa) takes precedence over the 1980 Hague Convention by virtue of Art 60.

28. Within this context, in *Hampshire CC v CE and NE* the CJEU was concerned with the following question posed in its judgment at [33]:

“Where it is alleged that children have been wrongfully taken from the country of their habitual residence by their parents and/or other family members in breach of a court order obtained by a public authority of that State, may that public authority apply to have any court order directing the return of the children to that jurisdiction enforced in the courts of another Member State pursuant to the provisions of Chapter III of [Regulation No 2201/2003] or would this amount to a wrongful circumvention of Article 11 of that Regulation and the 1980 Hague Convention or otherwise amount to an abuse of rights or law on the part of the authority concerned?”

29. As the CJEU set out at [45] and [46], in essence therefore, the question before the court was whether an applicant should exhaust the legal remedies available under the 1980 Hague Convention in the receiving Member State *before* seeking recognition and enforcement of a domestic return order under Chapter III of BIIa. In answering this question the CJEU noted that:

- i) The 1980 Hague Convention and BIIa have the common objective of deterring child abductions between States and, in cases of abduction, obtaining the child’s prompt return to the State of the child’s habitual residence (see *Rinau C-195/08 PPU* at [48] and [52]).
- ii) That BIIa compliments the 1980 Hague Convention, which nonetheless remains applicable.
- iii) That Art 34 of the 1980 Convention provides that it shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.
- iv) That Art 11(1) of BIIa further clarifies the relationship between the two instruments.
- v) That the provisions of the 1980 Hague Convention and of BIIa do not require a person, body or authority, where the international abduction of a child is alleged, to rely on the 1980 Hague Convention in applying for a child’s prompt return in the State of the child’s habitual residence.
- vi) That that interpretation is borne out by Article 60 of BIIa, from which it is apparent that that regulation is to take precedence over the 1980 Hague Convention (see *Rinau C-195/08 PPU* at [54]).

30. Within this context, and concluding that in the circumstances where it is alleged that children have been wrongfully removed, the decision of a court of the Member State

in which those children were habitually resident, directing that those children be returned and which is entailed by a decision dealing with parental responsibility, may be declared enforceable in the host Member State in accordance with those general provisions, the CJEU held as follows at [53] regarding the relationship between enforcement under BIIa and proceedings pursuant to the 1980 Hague Convention:

“Thus, a holder of parental responsibility may apply for the recognition and enforcement, in accordance with the provisions of Chapter III of Regulation No 2201/2003, of a decision relating to parental authority and the return of children that has been made by a court having jurisdiction under Chapter II, Section 2, of Regulation No 2201/2003, even if that holder of parental responsibility has not submitted an application for return based on the 1980 Hague Convention.”

31. The ECtHR has also recognised that, pursuant to Art 60 of BIIa, in relations between EU Member States BIIa takes precedence over the 1980 Hague Convention in so far as it concerns matters governed by the Regulation. In *Oller Kaminska v Poland* [2018] ECHR 70 following the separation of the parents in Ireland the father returned to Poland and sought to take the child on holiday to that jurisdiction. The mother secured a declaration in the Irish court that the child was habitually resident in the jurisdiction of Ireland and a consent order was agreed providing for the child to go to Poland on holiday. The father failed to return the child and the Irish court made a residence order in favour of the mother and ordered the child’s return to the jurisdiction of Ireland. The mother sought to enforce the Irish return order in Poland under the provisions of BIIa Chapter III and made an application under the 1980 Convention. The Polish court dismissed the application under the 1980 Hague Convention. Proceedings to enforce the Irish return order in Poland took some three years to conclude. The Polish Government conceded that non-enforcement of the Irish return orders constituted an interference with the mother’s right to respect for her private and family life but contended that this was justified as having had a proper legal basis and being necessary in a democratic society. In determining that a failure by the Polish authorities to act swiftly to enforce the Irish judgments as required under the EU law constituted an unjustified infringement of the mother’s Art 8 rights, the ECtHR observed at [88] that:

“[88] The Court must also be aware of the context, which is an all important factor for the interpretation of treaties. The 1980 Hague Convention is not the only instrument regulating matters connected with child abduction in relations between Poland and Ireland. Both States are also parties to the 2003 Brussels II bis Regulation and the 1980 Luxembourg Convention. The 1980 Hague Convention itself has to be interpreted and applied in the context of those instruments.”

32. Within the foregoing context, it is also of note that in *The International Movement of Children: Law, Practice and Procedure* Lowe *et al* state at para 33.3 as follows with respect to the hierarchy of remedies where there is already in force a domestic order relating to parental responsibility or measures directed to the protection of the person or property of the child or a decision relating to custody:

“Although it might seem as if the remedy of first resort when there is a judgment or binding agreement relating to parental responsibility or

measures directed to the protection of the person or property of the child or a decision relating to custody would be an application for registration and enforcement, in fact there is a 'hierarchy' insofar as the revised Brussels II Regulation takes precedence over each of the three Conventions. In turn, the Hague Abduction Convention takes precedence over the European Custody Convention. There is, however, no formal hierarchal position as between the Hague Protection Convention and the Hague Abduction Convention or the European Custody Convention.”

33. With respect to the approach taken in *this* jurisdiction to enforcement under Chapter III of BIIa in the context of pending proceedings under the 1980 Hague Convention in light of the foregoing principles, in *JRG v EB (Abduction: Brussels II Revised)* [2013] 1 FLR 203 Mostyn J declined to adjudicate an application under the Child Abduction and Custody Act 1985 for a return order under the 1980 Hague Convention in favour of the route provided by Chapter III of BIIa. The three subject children were habitually resident in France and had been retained by their mother in the jurisdiction of England and Wales following the French court making a residence order in respect of the children in favour of their father and granting an Annex II certificate pursuant to Art 39 of BIIa. Within this context, and having regard to (a) the primacy of the French court with respect to the welfare adjudication, (b) the precedence of BIIa over the 1980 Hague Convention pursuant to Art 60 of the former, (c) the clear route laid down in BIIa for the enforcement of the French order, which route can only be withheld in the context of the circumstances set out in Art 23 of BIIa, (d) the fact that the mother’s defences under the 1980 Hague Convention could be overreached under BIIa Chapter III or Art 11(8), (e) the terms of the Overriding Objective in FPR 2010 r 1 and (f) the requirement in s. 49(2) of the Senior Courts Act 1981 for the court to ensure, as far as possible, that all matters in dispute between the parties are completely and finally determined, and multiplicity of legal proceedings avoided, Mostyn J concluded at [17] that where there is a residence or other relevant parental responsibility order made in a fellow Member State, the route of enforcement of that order in this jurisdiction provided by Chapter III of BIIa should normally be adopted in preference to an application under the 1980 Hague Convention in this jurisdiction.
34. In *ET v TZ (Recognition and Enforcement of Foreign Residence Order)* [2014] 2 FLR 373 Mostyn J revisited the subject of the relationship between the 1980 Hague Convention and BIIa in the context of enforcement. In that case the mother sought to enforce a Polish interim residence order and sought a return order under the 1980 Hague Convention following the abduction of the child by the father to the jurisdiction of England and Wales. Her application under the 1980 Hague Convention was first in time, followed by her application under Chapter III of BIIa for a declaration of enforcement of the Polish interim residence order. Within that context, Mostyn J held as follows as to the correct order for determining the applications:
- “[4] By virtue of Art 60(d) of BIIR, this Regulation takes precedence over the relevant parts of the Convention. It follows that I should consider the submissions of all parties and give a ruling on the subject of the enforcement issue first.”
35. Finally, in their Skeleton Argument, leading and junior counsel for the father make extensive reference to two recent decisions of the Court of Appeal. In *Re A (A Child)*

[2016] 4 WLR 111 Lady Justice Black (as she then was) reviewed comprehensively the approach of the Member States of the EU to the interrelationship between the 1980 Hague Convention and BIIa in cases of alleged child abduction. In the context of a case in which the judge at first instance had ordered the return of the subject child to the jurisdiction of Sweden under Art 20 of BIIa notwithstanding the existence of ongoing proceedings in Sweden under the 1980 Hague Convention, Black LJ observed as follows:

“[38] Given all these indicators that the return of a child who has been abducted from one Member State to another is expected to be dealt with under the 1980 Hague Convention and Article 11 of Brussels IIA, it seems to me that there would have to be a particularly compelling reason even to think of circumventing a properly constituted 1980 Hague Convention application for the return of a child, by proceeding instead under Article 20 of Brussels IIA. In so doing, the court would be falling out of step with the other Member States of the EU and abandoning the detailed provisions of the Convention and the Regulation, which have been carefully calibrated to safeguard the interests of parents and children (see, for example, commentary on the Convention by the Supreme Court in *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 at paragraphs 14 to 18). Article 20, useful though it is in appropriate cases, contains no guidance as to the circumstances in which the court will act, save that the case will be urgent and the measures taken "provisional, including protective". There is no route map of the kind provided by the Convention and Article 11, which focusses the minds of the parties and the court upon the issues which are likely to bear upon whether a return order should or should not be granted.

[39] Although the judge was rightly concerned to act quickly in the interests of the child, there was no reason in the present case to abandon the Hague Convention proceedings in favour of Article 20 and it was, in my view, wholly inappropriate to do so.”

36. Two years later, in *Re S (Abduction: Hague Convention of BIIA)* Moylan LJ was concerned with the question of whether, if the English court had power to make a summary return order at the outset of the proceedings with respect to a subject child who had been removed from the jurisdiction of England and Wales to another Member State of the EU, it should do so or should wait before exercising its substantive jurisdiction under BIIa until the determination of proceedings under the 1980 Hague Convention in the receiving Member State.
37. In *Re S* the subject children had been residing with their mother in England subject to a child arrangements order made in November 2010. When the father did not return the children from the Netherlands in September 2017 after a summer holiday, the mother had applied to enforce the child arrangements order made in November 2010 and applied to the English court for an order for summary return of the children to the jurisdiction of England and Wales. A summary return order was granted by the High Court. Thereafter, the mother also made an application via the Central Authority under the 1980 Hague Convention in the Netherlands. Whilst not ruling out the possibility of a domestic summary return order being the appropriate remedy in

certain cases, Moylan LJ held as follows regarding the choice between that route and an application under the 1980 Hague Convention:

“[46] The real issue is how the court should approach the question of whether it should exercise the power to make a summary return order when a child is alleged to have been wrongfully removed to or retained in another Member State.

[47] The situation in this case is not the same as that in *In re A*. I do not, therefore, consider that a "particularly compelling reason" would be required before it would be appropriate for a court to make a return order summarily at the outset of proceedings. However, having regard to the matters set out above, I consider that, absent a good reason to the contrary, the better course is for the court to defer making a return order until an application under the 1980 Convention has been determined in the other Member State. As Black LJ said this is how the return of a child is "expected to be dealt with". Once such a determination has been made the court can then decide what order to make pursuant to Article 11(8) of BIIa.

[48] Apart from this being the "expected" route, it has certain real advantages. First, a higher degree of direct assistance is likely to be provided by the authorities in the requested state to a party bringing an application under the 1980 Convention than in respect of an application for the enforcement of an order. Secondly, there is a specific obligation on states to determine applications under the 1980 Convention within 6 weeks. There is no such specific requirement in respect of the enforcement of parental responsibility orders. Thirdly, Article 11 provides what is to happen if a non-return order is made. There is, therefore, a tailor-made procedure through which the courts of the respective Member States engage with the case and engage with each other. Additionally, any subsequent return order has an expedited enforcement procedure under Chapter III, Section 4 and, to repeat, "without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with" Article 42(2). The making of a summary return order does not necessarily lead to the expeditious return of a child.

[49] The advantages of an application being made under the 1980 Convention as against making a summary return order are evident from the circumstances of this case. Having obtained a summary return order, the mother found herself unable effectively to apply for its enforcement. It is not, therefore, known whether she might have encountered other difficulties under Article 23, for example on the issue of whether the voice of the child had been heard. Although there were some delays in the mother's application under the 1980 Convention being progressed, once she engaged with the process required in the Netherlands to progress an application under the 1980 Convention, the court there dealt with the application with expedition. That such applications are dealt with expeditiously can be seen from the information provided in its Annual Report for 2017 by the Dutch Office of the Liaison Judge for International Child Protection (BLIK). This is not to say that a return order would be made but that the process was more likely to be expedited by making an application under the 1980

Convention than seeking to enforce a summary return order by means of BIIa.”

DISCUSSION

38. In this case the first question for the court is not, as in *Re S*, whether or not to take the better course, absent a good reason to the contrary, of deferring *making* a domestic summary return order until an application under the 1980 Convention has been determined in the other Member State (although, for reasons I will come to, the issue of whether to make a *further* domestic return order in such circumstances does arise later as the second question in this case and is dealt with below). In this case a series of domestic summary return orders have *already* been made and have not been appealed. In this context, the question posed by the Deputy High Court Judge at the hearing on 24 January 2020, and listed before me for consideration, is whether it is appropriate for the procedure under Chapter III of BIIa now to be used by the father to seek to enforce in Poland those already extant domestic return orders (and any further such orders that might be made) notwithstanding that proceedings are also pending in Poland under the 1980 Hague Convention.
39. Having regard to the legal principles set out above, the short answer to that question is that it is not a question for this court to answer. Rather, that question falls to be determined by the court that will be asked, pursuant to the provisions of Chapter III or BIIa, to recognise and enforce the domestic return orders, namely the court in Poland.
40. To reiterate, in this case the English court has made a series of domestic summary return orders. HHJ Robinson made return orders in the proceedings under the Children Act 1989 on 27 September 2018 and 8 October 2019. Her Honour Judge Robertshaw made an summary return order on 2 December 2019, probably under the inherent jurisdiction of the High Court. Whilst, having regard to the decisions of the Court of Appeal in *Re A* and *Re S*, this may or may not have been the better course in this case at that point in time, that is now the position in this case. As I have noted, those orders have not been appealed.
41. In circumstances where the father now seeks to use the procedure provided by Chapter III of BIIa to enforce those orders, the *only* further step this court is required to take to facilitate that course of action by the father is the provision of one or more Annex II certificates pursuant to Art 39 of BIIa. In circumstances where the father is entitled to Annex II certificates as of right having regard to the terms of Art 39, the question of whether it is appropriate to provide him with such certificates in circumstances where he has also commenced Hague Convention proceedings in Poland simply does not arise for determination at this stage of the domestic proceedings. Indeed, at no point does the question of whether it is appropriate for the procedure under Chapter III of BIIa now to be used by the father to seek to enforce this court’s orders in Poland, notwithstanding that proceedings are also pending under the 1980 Hague Convention in that jurisdiction, fall for determination by this court in the circumstances of this case.
42. In the circumstances of this case, where the father seeks to use the provisions in Chapter III of BIIa to seek recognition and enforcement of the domestic summary return orders in the Member State to which the child has been removed, namely Poland, the framework provided by Chapter III of BIIa makes clear that the question

of whether he should be permitted to do so notwithstanding the existence of pending proceedings under the 1980 Hague Convention in that jurisdiction is one that falls to be determined by the Polish court, if it considers it to be relevant, alongside consideration by the Polish court of the criteria set out in Art 23 of BIIa when deciding whether to recognise the summary return orders made in the jurisdiction of England and Wales and to declare them enforceable pursuant to Art 28(1) of BIIa.

43. Within this context, whilst I am grateful for the diligent and comprehensive submissions of leading and junior counsel on behalf of the father setting out why this court should “allow the father to pursue enforcement of an order for return pursuant to Chapter III of Brussels IIA”, those submissions proceed on the mistaken basis that this court has jurisdiction to decide whether the father should be *permitted* to pursue enforcement of this court’s orders under the provisions of Chapter III of BIIa. It does not. Once the father has obtained orders from this court, the decision to request an Annex II certificate and to pursue the recognition and enforcement of those orders in Poland under the provisions of Chapter III of BIIa is a matter entirely for him. If he elects to pursue that option, thereafter the decision whether to recognise and enforce the orders made by the English court pursuant to the provisions of Chapter II of BIIa is a matter entirely for the Polish courts.
44. The domestic authorities cited by the father, and the decisions of Mostyn J in *JRG v EB (Abduction: Brussels II Revised)* and *ET v TZ (Recognition and Enforcement of Foreign Residence Order)* to which I have referred, shed light on the approach that would be taken by the English courts to the question of whether enforcement under the provisions of Chapter III of BIIa of orders made by another EU Member State would be permitted in this jurisdiction where there are also pending proceedings in this jurisdiction under the Child Abduction and Custody Act 1985 for relief under the 1980 Hague Convention. But again, for the reasons I have given, in this case that question is not one for this court to answer. It would, of course, be inappropriate for this court to express any view as to how the court in Poland should decide that question.
45. Finally, the father invites this court to attach a penal notice to the return order made by HHJ Robertshaw on 2 December or, in the alternative, make a further return order under the court’s inherent jurisdiction in light of the difficulties with that order raised by the Guardian and the mother’s continued default of it and the orders granted by HHJ Robinson. This latter application *does* engage the observations made by the Court of Appeal in *Re A* and *Re S* in that the court is being asked again to exercise its jurisdiction to make a return order notwithstanding that there are extant proceedings under the 1980 Hague Convention in Poland. Accordingly, the second question the court must ask itself in this case whether there is good reason to grant a *further* return order in such circumstances. I am satisfied that in the very particular circumstances of this case that there is.
46. V has been retained outside the jurisdiction of his habitual residence since September 2019. Each of the judges in this jurisdiction who has considered V’s position since September 2019 has considered it in V’s best interests to make a summary return order. The mother has failed to comply with these return orders and to provide proper medical evidence to justify that failure. The mother has had notice of this hearing but has not sought to attend. Within this context, I can identify no changed circumstances that justify this court now concluding that it is now no longer in V’s best interests to

return to the jurisdiction of his habitual residence in order that the welfare issues in respect of him can be determined by the court with substantive jurisdiction.

47. Within this context, and whilst cognisant of the observations of the Court of Appeal in *Re S*, it would not in my judgment be appropriate for this court to decide now to change course and refuse a further return order simply on the basis of existing Hague proceedings absent any new circumstances changing the considered best interests analysis of previous courts. Further, and of some relevance, in my judgment to now refuse a further return order absent a change in the circumstances that have previously justified such orders would risk further confusing the position from the perspective of the Polish courts and would in that context risk potentially prejudicing the father's position in the proceedings in Poland. Finally, with respect to the current return orders, the orders made by HHJ Robinson are now out of date by reference to the return dates they provide and, as I have set out above, there is some uncertainty regarding the jurisdictional basis on which the return order made by HHJ Robertshaw was promulgated. In the circumstances, and again cognisant of the generally applicable approach articulated by Moylan LJ in *Re S*, I am satisfied that it is in V's best interests to grant a further return order and to attach a penal notice to the same.

CONCLUSION

48. In the circumstances, I am satisfied that it is not necessary or appropriate for this court to reach a conclusion on the effect of extant proceedings under the 1980 Hague Convention in Poland on the ability of the father to enforce orders under the provisions of Chapter III or BIIa, that question in this case being one solely for the Polish court. For the reasons I have given, I am prepared to grant a further return order under the inherent jurisdiction of the High Court and to attach a penal notice to that order. The court will further provide to the father an Annex II certificate pursuant to the provisions of Arts 37 and 39 of BIIa.
49. That is my judgment.